JOSEPH F. SPANIOL, JR
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

NO. 88-1711

DONALD PRUESSMAN

Petitioner,

v.

GORDON LEWIS, M.D.; DR. JOHN T. MacDONALD FOUNDATION d/b/a DOCTORS HOSPITAL; JOSEPH F. McALOON; STUART L. SMITH; L.C. SMALL; CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GLENN FALK; COMMUNITY HEALTH OF SOUTH DADE, INC.; JOHN H. TRENHOLM; JEROME BELOFF, M.D.; ANGEL DIAZ M.D.; MICHAEL ROBINSON

Respondents.

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION OF RESPONDENTS CITY OF CORAL GABLES; KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR.; GORDON LEWIS, M.D.; GLENN FALK

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PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

REPLY TO BRIEF IN OPPOSITION OF RESPONDENT GORDON LEWIS, M.D.

The record and my petition contradicts LEWIS' assertion that he was served on January 20, 1988. (Brief in opposition, page 2). This respondent received the complaint and summons by certified mail on

January 6, 1988.[1]

Relying on *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942); and *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), LEWIS argues that the potential for piecemeal litigation "overwhelmingly" weighs in favor of the dismissal of my § 1983 action. (Brief in opposition, page 9).

Neither *Brillhart* or *Will* apply to the issue before this Court for review. The message in *Brillhart* was directed to a pending state suit which solely concerned a declaratory judgment and

> ". . .presenting the same issues, not governed by federal law, between the same parties." *Brillhart*, supra, 316 U.S. at 495.

In *Will*, even though a federal issue was involved, the case is distinguishable as it concerned the propriety of a writ of

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1/ Petition, appendix, page A-38. Record reference: R1-17-Exhibit "A".

mandamus directed to a district court's stay in the proceedings of a declaratory judgment suit where the parties and issues were identical. However, there is an important admonition in Justice Brennan's dissenting opinion that is instructive when considering the Eleventh Circuit's opinion in this case:

> ". . .there lurks an ominous potential for the abdication of federal court jurisdiction in the opinion's disturbing indifference to 'the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.'" *Will*, supra, 437 U.S. at 669.

LEWIS contends that the state court action has progressed much further than the federal court action and "overwhelmingly" weighs in favor of dismissal of my federal suit. (Brief in opposition, pages 9 and 13). Both the record and my petition contradict this assertion.[2]

2/ Petition, appendix, pages A-33, A-34, A-52, A-53, A-54. Record reference: R1-17-6.

State action progress consists of discovery and exchange of documents and partial answers to interrogatories. One deposition has been taken and numerous discovery disputes remain. This discovery in the state action can be utilized, concededly without my objection, in the federal action. Motions to dismiss have yet to be entertained and the action is still subject to a stay order of the state court of September 29, 1988.

Relying on *City Fed. Sav. Bank v. Dominion Fed. Sav. Loan Ass'n*, 657 F. Supp. 477, 480, LEWIS argues there is no reason for the district court to proceed with my § 1983 claim where "one umbrella is available that will keep everyone out of the rain." (Brief in opposition, page 10).

The fact situation in my action clearly shows that it is only the federal umbrella that can keep everyone dry.

LEWIS argues that the Eleventh Circuit's ruling is consistent with rulings of this Court and other lower federal courts that the dismissal of a federal action in deference to a state court action was proper, even when based on a violation of § 1983. (Brief in opposition, pages 16 through 20).

Dismissal of a suit by a federal court depends on the facts of each case. There is no mechanical checklist. A synopsis of the cases relied on by LEWIS in support of his argument reveals the following.

In *Sisler v. West*, 570 F. Supp. 1 (S.D. Iowa 1983), the plaintiff filed a federal § 1983 action eighteen months after filing a state court action based on state law theories. The issues and the parties were identical in both suits and the complaint was dismissed.

Unlike the plaintiff in *Sisler*, I

simultaneously filed a complaint based on state law claims in state court and my §1983 claim in federal court. Further, the parties and issues in my two actions are not identical.

In *Glover v. City of Portland, Tennessee*, 675 F. Supp. 398 (M.D. Tenn. 1987), the plaintiff filed a suit in state court. Some nine months later, the state complaint was amended adding parties and, about the same time, the plaintiff filed an identical complaint in federal court. Approximately one month later, the plaintiff voluntarily dismissed her federal action. Some four months later, the plaintiff voluntarily dismissed her claim against one defendant in state court and filed the claim as to that defendant in federal court. The plaintiff's second federal complaint was dismissed.

Unlike the plaintiff in *Glover*, I have

not non-suited any defendants in the state forum and added them in the federal forum. There has been no forum shopping and, from the onset, I have expressed and reserved my intent to pursue my federal claim in federal court. Further, the federal and state actions have never been identical.

In *Devona v. City of Providence*, 652 F. Supp. 683 (D.R.I. 1987),[3] the plaintiff filed similar claims in state and federal courts, the only difference being that the state proceeding had one additional defendant. Based on this fact, the district court determined that only the state forum could afford comprehensive disposition of the suit and dismissed the complaint.

Distinguishing *Devona* with my § 1983 suit, the opposite holds true. It is only the federal forum that can afford

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3/ This case is not included in LEWIS' Table of Authorities.

comprehensive disposition of the suit.

In his discussion of the dismissal in *Devona*, LEWIS states that the presence of a § 1983 action did not alter the court's conclusion. (Brief in opposition, page 20), and reference is made to three additional § 1983 cases which need to be distinguished. All three of these involved stays, not dismissals.

The first, *Roy v. Verchereau*, 619 F. Supp. 1323 (D.C. Vt. 1985), involved abstention based on avoiding a potentially disruptive effect on state efforts to establish a coherent policy.

The second, *Diaz Gonzalez v. Colon Gonzalez*, 536 F.2d 453 (1st Cir. 1976), was a case where the judgment of a district court was vacated and remanded. The First Circuit held that the district court should have abstained because a Puerto Rican statute was at issue and the commonwealth

courts should be allowed to rule on the issue. The court also held that the district court should retain jurisdiction of the case while the plaintiff sought a decision from the commonwealth courts concerning the statutory question underlying his § 1983 action.

Finally, LEWIS presents *Lumen Const. Inc. v. Brandt Const. Co., Inc.*, 780 F.2d 691 (7th Cir. 1985), which like *Devona*, supra, was a suit where the state action was a good deal more comprehensive than the federal case. Also, the court noting that the plaintiff's civil rights claims arose out of a contractual dispute, the court found it would be impossible to decide the federal claims without some resolution of the state law claims. Moreover, the district court could have reasonably concluded that all claims were likely to be determined in the state court action.

"In short, the similarity between the two cases is sufficient to justify the conclusion that the state court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. *Lumen*, supra, at 695, 696 citing *Moses H. Cone Hospital v. Mercury Const. Co.*, 460 U.S. 1. 28.

Applying the above *Cone* standard to my § 1983 action, it is evident that the state-court litigation cannot completely and promptly resolve the issues between the parties. Further, in *Lumen*, supra, the judgement of the district court was modified from a dismissal to a stay.

The above cases, seen in their true light, do not support the proposition for which they are propounded to this Court.

REPLY TO BRIEF IN OPPOSITION OF RESPONDENTS KEN BUSH; R. POOR; D. MOORE; RICHARD J. NAUE, JR. (CITY AND OFFICERS)

The opposing brief filed by CITY and OFFICERS is incompatible with Supreme Court Rule 34.6 of this Court. It contains argument of many of the factual allegations of my complaint recited in my petition's statement of the case. A copy of the complaint has been lodged with the Clerk of this Court.

There are evidentiary matters throughout the brief that are not supported by the record or evidence. These matters are proper before a trial court, not this Court where the issue is the surrender of federal jurisdiction of an action brought under 42 U.S.C. § 1983.

Absent specific instructions in the Supreme Court Rules, I am following the advice given in the publication, "Supreme Court Practice", which counsels that

scandalous matter has no place in a brief, and should be addressed in a motion to strike.[4] Such a motion is being filed simultaneously with this reply.

In their brief, CITY and OFFICERS belabor the matter of service of process. (Brief in opposition, pages 6 and 14). With one possible exception, raised for the first time by respondent CITY, this matter has been adequately addressed in my petition and is supported by the record that service was proper and valid.[5]

CITY argues that by employing Federal Rule of Civil Procedure 4(c)(2)(C)(ii) upon CITY, a municipality, service was improper and invalid because it was not personally served on the chief executive officer

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4/ Supreme Court Practice by Stern, Gressman & Shapiro. (Sixth Edition). Section 13.11(n), page 566.

5/ Petition, pages 13, 15, 19, 21, appendix, pages A-27, A-36, A-38, A-39, A-49, A-50, A-51. Record reference: R1-17-2 & Exhibits "A" through "A"(16).

pursuant to Rule 4(d)(6) and that

> "where a particular method of serving is pointed out by statute that method *must* be followed." (emphasis added by respondent).

In the guide I used for effecting service, West's Federal Civil Judicial Procedure (1987 Edition), Rule 4(d)(6) states:

> Upon a state or municipal corporation or other government organization thereof subject to suit, by delivering a copy of the summons and complaint to the chief executive officer thereof, *OR* (emphasis added), by serving the summons and complaint in the manner prescribed by law of that state for the service of summons or other like process upon any such defendant.

There is no mention in West's that delivery means personal service nor. . .

> "where a particular method of serving process is pointed out by statute, that method must be followed." (Brief in opposition, page 15).

In accordance with the language of the rule, service was effected on the Mayor or in his absence the Vice Mayor or in the

absence of both, any member of the City Council. This was accomplished by certified mail, return receipt requested. Postal records indicate that service was delivered and accepted on January 7, 1988.[6]

Further, it would appear that the mere fact that CITY and OFFICERS appeared in the district court and argued their motion to dismiss on January 25, 1988, precisely twenty days after service was effected, the matter of service as to these respondents was rendered moot.

Finally, CITY and OFFICERS allege that I intentionally discharged my legal counsel. (Brief in opposition, page 17). The record and my petition contradict this allegation.[7] As indicated to the district court, my

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6/ Petition, appendix, page A-38). Record reference: R1-19-Exhibits "A" and "A"(6).

7/ Petition, appendix, page A-18. Record reference: R1-4-5.

attorney was suspended from practice.[8] Further, there never has been legal representation in the federal action.

The inferences of these respondents with respect to "egregiousness" in the prosecution of my suit has no merit.

Filing a complaint the day before the statute of limitations expires is a right and cannot therefore be egregious. The delay in making service was cured when the district court, upon my showing of good cause, quashed it's order to show cause and ordered me to proceed with prosecution of the action. These facts, coupled with compliance of the district court's order to make service within the forty-five day period specified,[9] cannot constitute egregious conduct.

8/ Florida Bar v. Louis B. Stoskopf. Supreme Court of Florida, Case No. 70,856 (October 1, 1987).

9/ Petition, appendix, pages A-21, A-22.

REPLY TO BRIEF IN OPPOSITION OF RESPONDENT GLENN FALK

Respondent FALK states that both the state and federal actions commenced on May 28, 1986 sought relief under both state law and 42 U.S.C. § 1983. (Brief in opposition, page 1). The record and my petition contradict this. My complaint encompassing only state law claims was filed in state court on May 26, 1988, the same day my federal complaint based on federal law was filed in federal court.[10]

FALK represents to this Court that the federal action remained dormant for sixteen months after perfection of service of the state action. (Brief in opposition, page 2). The dates in FALK'S brief contradict this. April 5, 1987 to October 2, 1987 is a period of six months.

10/ Petition appendix, pages A-14, A-26. Record references R1-4-3 and R1-17-1.

FALK also alleges that I obtained jurisdiction over defendants in the state action over eighteen months before any of the defendants were served in the federal action. (Brief in opposition, page 7). As indicated above, my complaints were filed simultaneously in state and federal courts. The period of time between the service of the state complaint in April of 1987 and service of the federal complaint on January 7, 1988, is less than nine months.

Finally, relying on *Young v. Board of Education*, 415 F. Supp. 1139 (D.C. Colo. 1976), FALK argues that the state court action can award all relief available under the federal statutes. (Brief in opposition, pages 15 and 16).

The above is not possible in my case since the parties, issues, and damages are distinctly different in both forums.

CONCLUSION

The respondents have skirted the important jurisdictional issues presented in the petition and fail to set forth any valid reason why my petition should be denied. The need for review of the action below is undisputable.